

NO. 49918-5-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDDIE MONK,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the State present sufficient evidence that Mr. Monk was in possession of methamphetamine with intent to deliver?
2. Did the State present sufficient evidence to support Mr. Monk's conviction for possession of heroin with intent to deliver?
3. Should this court exercise its discretion and refrain from imposing appellate costs against Mr. Monk?

II. SHORT ANSWERS

1. Yes, the State presented sufficient evidence to the trier of fact that Mr. Monk was in constructive possession of the methamphetamine.
2. Yes, the State presented sufficient evidence to the trier of fact that the substance Mr. Monk possessed was heroin.
3. The State defers to this court on the issue of appellate costs.

III. FACTS

The State generally agrees with the recitation of the facts and procedural history of this case. Where appropriate, the State will refer specifically to the record to clarify any inconsistencies or misstatements as presented in the Appellant's Brief.

IV. ARGUMENT

1. STANDARD OF REVIEW.

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 707-08, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

2. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT MR. MONK WAS IN CONSTRUCTIVE POSSESSION OF THE METHAMPHETAMINE.

Possession of a controlled substance may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. *Id.*

(citing *State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1967)). To establish constructive possession, courts must

look at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them.”

State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Here, the State presented sufficient evidence to the trier of fact that Mr. Monk was in constructive possession of the methamphetamine. When looking at the totality of the situation, it is clear that Mr. Monk had dominion and control over the methamphetamine that was located in the back bedroom of the residence. Generally, the State’s evidence presented to the following facts:

1. The detectives who investigated this case executed a search warrant that authorized them to search for two specific things: controlled substances and Mr. Monk. 1RP at 54.
2. Mr. Monk’s personal property was found throughout the back bedroom.
3. Mr. Monk had a key to one of the safes found in the room.
4. Mr. Monk admitted to Det. Mortensen that his drugs would be found in the back bedroom where he had been located.

Prior to the execution of the warrant, the detectives conducted surveillance and observed two vehicles known to be associated with Mr. Monk parked at the residence. 1RP at 88. This fact is important because

detectives did not happen to come across Mr. Monk when they executed the warrant, nor was it a mere coincidence that he was present when the detectives made entry. They expected to find him there, and he was found in the back bedroom. Additionally, Mr. Monk was first seen in the residence fleeing into the back bedroom as entry was made. 1RP at 118.

Further, upon entry, they immediately located Mr. Schmidt and Ms. Martin on a makeshift bed in the living room. It appeared to the detectives that their entry into the residence woke them up. 2RP at 19. Items of personal property belonging to Mr. Schmidt, including controlled substances, were located in this general area. 2RP at 21.

The room that Mr. Monk was located in had numerous items of his personal property strewn about. Detectives located his pants, which contained his wallet and identification. 1RP at 63. Numerous knives were found in the room. One of these knives had the Mr. Monk's name engraved upon it. 1RP at 97, 124. Mr. Monk's mail was also located in the room. This is not a factual scenario where he had a single item in the room or multiple items piled in a corner of the room. Instead, detectives located numerous items readily identifiable as belonging solely to Mr. Monk throughout the room. They did not find anything associated with Mr. Schmidt, Ms. Martin or Ms. Jacobs. Only items associated with Mr. Monk were found in the back bedroom.

Mr. Monk's jeans also contained a large set of keys. One of the keys opened one of the safes found in the room, which contained heroin. The second safe had to be forced open with tools. This fact does not negate possession. As Det. Langlois testified, the drug trafficking world involves paranoia. Multiple security devices can be utilized by an individual trafficking controlled substances. This paranoia often leads items, such as keys, being hidden. Likewise, it is not uncommon for two keys, one for each safe, to not be included on the same keyring. 1RP at 65. The logic here is simple: if the key ring is lost, the drug trafficker will not lose access to the contents of both safes.

This paranoia also presents itself in an additional fact – the scale found just outside of the open bedroom window. The detectives noted that the location of the scale was indicative of it being hastily thrown out the window. 1RP at 67-68, 95. The scale contained two forms of residue – methamphetamine and heroin. 2RP at 53-58. Thus, the scale was used to weigh out both controlled substances. The same substances found in each safe. This is not a simple coincidence. This is an additional fact connecting Mr. Monk to the items located in that bedroom, including the contents of *both* safes.

The presence of the shotgun and ammunition further shows Mr. Monk's connection to the methamphetamine. Drug traffickers will often

arm themselves for protection. The shotgun and knives found in the room would constitute as protection. Mr. Monk was in constructive possession of the methamphetamine, just as he was in constructive possession of the shotgun.

Finally, during a one-on-one interview, Det. Mortensen asked Mr. Monk “Where is your bulk amount of dope?” 2RP at 22. Mr. Monk replied to this question with a head nod towards the back bedroom and stated “you might want to check back there.” 2RP at 22-23. This is not an ambiguous statement, nor can Mr. Monk challenge the truth of the State’s evidence when challenging the sufficiency of the evidence. Mr. Monk was not asked where the drugs were, or where Mr. Schmidt’s drugs were. He was asked where *his* drugs would be located and Mr. Monk told him.

Mr. Monk’s own testimony helped the State establish evidence of dominion and control as well. Mr. Monk admits to having access to the residence as he pleased. He had spent the night at the residence prior to the execution of the search warrant. 2RP at 93. In fact, he would frequently spend the night at the residence, often up to three times per week. 2RP 83. He kept his mail and clothing in the back bedroom. 2RP at 87. He showered in the bathroom. 2RP at 87. He had knowledge about the exact location of the large quantities of drugs within the residence. 2RP at 86-87.

When looking at the totality of the situation, it is clear that the State presented sufficient evidence that Mr. Monk had dominion and control over the methamphetamine located in the back bedroom. The detectives expected to and did find him within the residence. Two vehicles associated with Mr. Monk were at the residence. Mr. Monk fled into the bedroom as the detectives made entry. His personal property, including clothing, weapons, mail, and safes were found in the room. And he admitted that *his* bulk amount of drugs would be found in the back bedroom. This is dominion and control. This is constructive possession. The conviction should be affirmed.

3. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE SUBSTANCE AT ISSUE WAS HEROIN.

“Generally, a chemical analysis is not vital to uphold a conviction for possession of a controlled substance.” *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006); *see also State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case) (citing *In re Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984) and (*State v. Eddie A.*, 40 Wn. App. 717, 720, 700 P.2d 751 (1985)). “Circumstantial evidence establishing identification may include...lay-experience based familiarity through prior use, trading or law enforcement.” *United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir.) *cert. denied*, 510

U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993). When determining whether enough circumstantial evidence exists, courts have previously looked at a non-exhaustive list of factors, including:

1. Testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible.
2. Corroborating testimony by officers or other experts as to the identification of the substance.
3. References made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug.
4. Prior involvement by the defendant in drug trafficking.
5. Behavior characteristic of use or possession of the particular controlled substance.
6. Sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. at 801 (citing *State v. Watson*, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)).

Here, the circumstantial evidence was sufficient to prove that the substance was heroin. First, four separate law enforcement officers testified as to the identification of the heroin. Sgt. Langlois testified that he has sixteen years of experience as a law enforcement officer, has received numerous hours of training in the detection and identification of controlled substances, and has investigated thousands of drug cases. 1RP at 39-43.

Based upon that training and experience, he is able to recognize heroin by sight, has knowledge about typical weights and quantity, knows how heroin is typically packaged and used, and can describe the typical items associated with heroin trafficking. 1RP at 44-47.

Det. Sanders has five years of law enforcement experience, has investigated hundreds of drug cases, and has received numerous hours of training in the detection and identification of controlled substances. 1RP at 81-83. Det. Ripp has seven years of law enforcement experience, has investigated hundreds of drug cases, and has received numerous hours of training in the detection and identification of controlled substances. 1RP at 107-09, 112-14. Det. Mortensen has six years of law enforcement experience, has investigated hundreds of drug cases, and has received numerous hours of training in the detection and identification of controlled substances. 2RP at 7-15.

As with Sgt. Langlois, all three of these detectives are able to recognize heroin by sight, have knowledge about typical weights and quantity, know how heroin is typically packaged and used, and can describe the typical items associated with heroin trafficking. Thus, the State presented extensive knowledge of heroin through the combination of thirty-four years of law enforcement experience, hundreds of hours of training, and thousands of drug related investigations.

Each of these witnesses described the heroin and its characteristics in the same manner. By sight, it was consistent with heroin. 1RP at 64, 131; 2RP at 25, 26. Det. Ripp and Det. Mortensen testified additionally that the feel and smell was also consistent with heroin. 1RP at 131-32; 2RP at 26. Additionally, the manner in which it was packaged was also consistent with heroin. 1RP at 64, 131; 2RP at 26. The detectives also located packaging material consistent with heroin possession and trafficking strewn about the room. 1RP at 67, 133-134. The fact that the heroin was found in a locked safe, just as the methamphetamine was, is consistent with heroin trafficking. Further, the large sum of money found in one of the safes was consistent with drug trafficking, both heroin and methamphetamine.

The digital scale located by Sgt. Langlois and Det. Sanders is essential to this analysis as well. Not only is this type of scale commonly used in heroin and methamphetamine trafficking, but it also contained heroin residue as well. 2RP at 58. Thus, it is reasonable to infer that this scale was used to weigh out the heroin that was found in the safe.

Finally, Det. Mortensen conducted a field test upon the heroin. 2RP at 27. The Valtox field test utilized in this case came back positive for heroin. 2RP at 27. On its own, this would be insufficient to conclude that the substance was heroin. However, when combined with the training and experience of the officers, the sight, touch and smell identification, the

manner in which it was packaged and secured, the packaging materials strewn about the room, the large sum of money, and the heroin coated scale, there clearly was sufficient evidence presented to the trier of fact that the substance was in fact heroin. The conviction should be affirmed.

4. THE STATE TAKES NO POSITION ON THE MR. MONK'S REQUEST FOR THIS COURT TO NOT IMPOSE APPELLATE COSTS.

This court can award appellate costs if the State substantially prevails in this appeal. Mr. Monk was found to be indigent by the trial court. The State simply defers to this court's discretion on the issue of appellate costs.

V. CONCLUSION

The State presented sufficient evidence to show that Mr. Monk was in constructive possession of the methamphetamine found in the back bedroom of the residence. The detectives were looking for Mr. Monk at the residence, he was found in the same room as the methamphetamine, his personal property (clothes, knife, mail, etc.) was found strewn about the room, he admitted to having access and control of the room on a frequent basis, he had knowledge of the presence of the methamphetamine, and told Det. Mortensen where *his bulk dope* would be located.

The State presented sufficient evidence to prove beyond a reasonable doubt that the substance was heroin. Four separate detectives

identified the heroin based upon sight, touch, and smells. Packaging material associated with heroin were found throughout the room. The quantity and manner in which it was packaged and stored was consistent with heroin trafficking. A digital scale, commonly utilized in heroin trafficking, was located and found to be coated in heroin. The substance was field tested and resulted in a positive result for heroin.

Respectfully submitted this 31 day of August, 2017.

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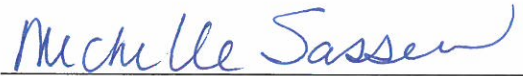
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 31st day of August 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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